FILE COPY

IN THE

Supreme Court of the United States

October Term, 1948

No. 368

HILDA OGDEN BRATT; BARBARA ANN BRATT, a Minor, by Her Guardian Ad Litem, Hilda Ogden Bratt; JOAN NANCY BRATT, a Minor, by Her Guardian Ad Litem, Hilda Ogden Bratt, Petitioners,

vs.

WESTERN AIR LINES, INC., a Corporation, Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, TENTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF

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WESTERN AIR LINES, INC., a Corporation, Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, TENTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF

May It Please The Court:

The petition of Hilda Ogden Bratt; Barbara Ann Bratt, a minor, by her guardian ad litem, Hilda Ogden Bratt; Joan Nancy Bratt, a minor, by her guardian ad litem, Hilda Ogden Bratt, respectfully shows to this Honorable Court:

I.

SUMMARY STATEMENT OF MATTER INVOLVED

The above entitled action was instituted in the District Court of the United States for the District of Utah, Central Division, to recover damages on behalf of his widow and children for the wrongful death of Jack Raymond Bratt. Additional actions were instituted against the

same respondent by J. H. Rosell and Christina McRae to recover damages for the wrongful death of the wife of Mr. Rosell and the son of Mrs. McRae in the same accident. By agreement the three actions were consolidated for trial, and on March 26, 1947, the jury returned a verdict in each case in favor of the respondent and against the petitioners (11).

Judgment was immediately entered in favor of the respondent and against the petitioner (12), and after denial of a motion for a new trial in each case (13, 19), the petitioners prosecuted separate appeals from the judgment. The judgment was affirmed by the United States Court of Appeals, Tenth Circuit (487-492).

It was stipulated between the parties that the three appeals might be heard and submitted to the appellate court upon one printed record and upon one set of briefs (24, 25). Therefore, this Court has before it each of the three cases which have been consolidated both for purposes of trial and appeal for the convenience of all concerned.

This petition before the Court arises after the second trial of these actions. The first trial resulted in a verdict returned on May 1, 1945, likewise in favor of the respondent and against the petitioners in each case. After the first trial, motions for a new trial were denied, and the appeals were prosecuted to the United States Court of Appeals, Tenth Circuit, which reversed the decision of the trial court and granted a new trial, principally on the ground that prejudicial error had occurred in the exclusion of evidence. The former appeal will be found reported as *Bratt, et al., v. Western Air Lines, Inc.,* 155 F. (2d) 850. After the decision of the United States Court of Appeals, Tenth Circuit, on the first appeal the respondent applied to the Supreme Court of the United States for certiorari, which was denied in 67 S. Ct. 100.

OPINION OF THE COURT BELOW

The opinion of the United States Court of Appeals, Tenth Circuit, is reported in *Bratt, et al., v. Western Air Lines, Inc.*, 169 F. (2d) 214, affirming the decision of the trial court. It will also be found in the record, page 487, et seq.

STATEMENT OF CASE

Flight No. 1 of Western Air Lines took off from the Salt Lake City airport at about 1:05 a. m., December 15, 1942, destined to Burbank, California, with a scheduled stop at Las Vegas. The flight plan called for a cruising altitude of 10,000 feet to Enterprise, Utah. At about 1:22 a. m., approximately three miles southeast of Fairfield, Utah, the airplane met with an accident and crashed to the ground, resulting in the death of thirteen passengers and four crew members. The plane was completely demolished.

These actions were brought to recover damages for the wrongful death of three of the passengers for hire, to-wit, Jack Raymond Bratt, a business man, who was 35 years of age, and left surviving his widow and two minor children, Lt. Hugh E. McRae, 21 years of age, who left his mother as his surviving beneficiary, and Leona N. Rosell, 40 years of age, who left her husband as surviving beneficiary.

The airplane was a Douglas DC-3 and with the exception of a few months when it was leased to Eastern Air Lines (137), it was at all times material in the custody and control of the respondent with respect to its ownership, inspection, maintenance, and operation. The operating statistics of this respondent and other carriers (132, 133) demonstrate that if the proper degree of care is exercised by those having the ownership, maintenance, inspection and control of modern aircraft in commercial flight, accidents of this kind ordinarily do not happen.

The evidence presented by respondent indicated that if an airplane is in good working order and condition and is properly managed and controlled and properly loaded and weather conditions are normal for flying, it would not get out of control and crash to the ground (232).

A determined search and inquiry failed to disclose the presence of any other aircraft in the immediate vicinity of the accident at the time (346). There was no evidence in the wreckage of any contact or collision with any plane or object in the air (346).

It appeared without dispute that the left wing tip and right horizontal stabilizer failed in the air, and that the plane was in the process of disintegrating before reaching the ground. Pieces of fabric and glass were found a distance of from 1,500 to 2,000 feet from where the plane came to earth (265). Counsel for respondent conceded that the fractures or failures in the left wing tip and in the right horizontal stabilizer occurred in the air (390).

Weather conditions were not only normal but were ideal for flight. The night was described as clear and smooth and beautiful (39, 42). For several days both before and after the accident there was a stable air mass in an area covering hundreds of miles around Fairfield (170). Respondent's records showed this stable air mass on the trip weather forecast (169). The entire picture indicated light and gentle winds and stable air conditions (170, 171). The government weather records, not merely the forecast, were all to the same effect (29-33).

It appeared without dispute and was formally admitted that respondent not only owned the aircraft but that at the time of and immediately prior to the accident it was in the possession and custody of its employees (27). Further, that the deceased passengers were all passengers for hire and that at the time of and before the accident none of them exercised any control or dominion over the plane (28). It was further admitted that after the acci-

dent the wreckage was inspected and examined at the scene by officials and employees of the respondent (28), and was delivered to the respondent by the C. A. A. about two weeks after the crash (29).

Upon the trial of this case petitioners predicated their right to recover solely and exclusively upon the doctrine of res ipsa loquitur. It may further be stated that respondent did not attempt at any time to establish any one particular cause for the accident, and merely suggested a variety of circumstances that might have some causative effect in its occurrence (389-427).

THE JURISDICTION OF THE UNITED STATES SUPREME COURT

The jurisdiction of this Court to review the decision of the United States Court of Appeals, Tenth Circuit, is invoked pursuant to Title 28, United States Code, Section 1254, effective September 1, 1948.

THE QUESTIONS PRESENTED

The principal questions presented by this application are as follows:

1. Whether in an action to recover for the injury or death of a passenger on a commercial plane in scheduled flight the doctrine of res ipsa loquitur applies in a case where the cause of the crash has not been established.

2. Whether in such a case a presumption of due care on the part of the deceased pilot destroys the inference of negligence under res ipsa loquitur.

These questions were decided adversely to the petitioners by the United States Court of Appeals, Tenth Circuit.

II.

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT

A. The decision here is contrary to and in conflict with the rule of law established by the United States Supreme Court in the case of *Gleeson v. Virginia Midland Railway Co.*, 140 U. S. 435, 11 S. Ct. 859, and by the United States Court of Appeals, Ninth Circuit, in *Smith v. Pacific Alaska Airways, Inc.*, 89 F. (2d) 253.

B. The United States Court of Appeals, Tenth Circuit, by its decision here has decided an important question of law in conflict with applicable local decisions of the Supreme Court of the state of Utah. *Deardon v. San Pedro, L. A. & S. L. R. Co.*, 33 Utah 147, 93 Pac. 271; *Loos v. Mountain Fuel Supply Co.*, 99 Utah 496, 108 Pac. (2d) 254.

C. The United States Court of Appeals, Tenth Circuit, by its decision here has decided an important question of law in conflict with applicable decisions of various state and federal tribunals. *Gleeson v. Virginia Midland Railway Co.*, 140 U. S. 435, 11 S. Ct. 859; *Smith v. O'Donnell*, 215 Cal. 714, 12 Pac. (2d) 933; *McCusker v. Curtiss-Wright, Inc.*, 264 Ill. App. 502; *English v. Miller* (Tex. Civ. App.), 43 S. W. (2d) 642; *Genero v. Ewing*, 178 Wash. 78, 28 Pac. (2d) 116; *Bowser v. Baltimore & Ohio R. Co.* (3 Cir.), 152 F. (2d) 436; *Mikolajczyk v. Allcutt* (3 Cir.), 102 F. (2d) 82; *Waite, et al. v. Pacific Gas & Electric Co.*, 56 Cal. App. (2d) 191, 132 Pac. (2d) 311; *Moeller v. Market Street Ry. Co.*, 27 Cal. App. (2d) 562, 81 Pac. (2d) 475; *Smith v. Hollander*, 85 Cal. App. 535, 259 Pac. 958.

PRAYER

Wherefore, your petitioners pray that a writ of certiorari be issued out of and under the seal of this Court, directed to the United States Court of Appeals, Tenth Circuit, commanding said court to certify and send to this Court the transcript of record in the case entitled, "Hilda Ogden Bratt; Barbara Ann Bratt, a Minor, by her guardian ad litem, Hilda Ogden Bratt; Joan Nancy Bratt, a Minor, by her guardian ad litem, Hilda Ogden Bratt, Appellants, vs. Western Air Lines, Inc., a Corporation, Appellee, No. 3556," including also the proceedings in the trial court together with the denial of petitioners' request for reversal by the United States Court of Appeals, Tenth Circuit, to the end that said cause may be reviewed and determined by this Court and the judgment of the lower courts be reversed.

HILDA OGDEN BRATT; BARBARA ANN BRATT, a minor, etc.; JOAN NANCY BRATT, a minor, etc., Petitioners,

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BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

STATEMENT OF CASE

The facts with reference to the origin and history of the case and also with reference to jurisdiction have been sufficiently covered in the petition, and in the interests of brevity will not be repeated here. The issues and evidence have likewise been discussed in the preceding petition so that the detailed picture need not be repeated. It might be well, however, to view in a little more detail the question of the trial court's charge concerning the doctrine of res ipsa loquitur.

The petitioners in this case relied squarely and solely on the doctrine of res ipsa loquitur. The trial judge advised the jury that the manner of control and operation of the airplane was embraced within the rule of res ipsa loquitur (458, 459). After thus advising the jury that it was permissible for them to infer negligence with respect to the operation of the plane, the court then categorically instructed the jury that they could not infer or presume negligence but must, on the contrary, presume that the deceased pilot had exercised ordinary care (481). The Circuit Court of Appeals of the Tenth Circuit frankly admitted that the instruction was clearly erroneous but contended that it was harmless (490).

Specifications of Errors to Be Urged.

The trial court and the United States Court of Appeals for the Tenth Circuit erred:

1. In holding that an instruction to the jury as a matter of law that the respondent's pilot was presumed to have exercised reasonable care was not prejudicial error.

2. In holding that the doctrine of res ipsa loquitur was properly presented to the jury.

3. In holding for all effectual purposes that the doctrine of res ipsa loquitur had no application to airplane accidents.

ARGUMENT

I.

The United States Court of Appeals, Tenth Circuit, and the Trial Court Erred in Permitting an Instruction to the Jury, as a Matter of Law, That the Respondent's Pilot Was Presumed to Have Exercised Reasonable Care.

The action of the trial court in instructing the jury that there was a presumption that the respondent's employees, who were killed in the crash, and were not parties to the action, exercised reasonable care constituted reversible error in that it completely destroyed any inference of negligence that might have arisen under the doctrine of res ipsa loquitur. It rendered the entire charge on this question inherently conflicting and self-contradictory.

The trial court instructed the jury that there was a presumption the deceased pilot exercised reasonable care for his own concern and that negligence may not be inferred or presumed against it (481). The instruction is inconsistent with that portion of the court's charge wherein he advised the jury that the manner of operation of the airplane was embraced within the rule of res ipsa loquitur (459). It was duly excepted to by petitioners' counsel (481).

It is the position of petitioners that the presumption of due care existing in an action for wrongful death is available only to negative contributory negligence on the

part of the deceased and not to supply or negative evidence of negligence of the tortfeasor. Particularly is this true in a case where the plaintiff relies on the doctrine of res ipsa loquitur. In such a case an instruction by the court that defendant's employees are presumed to have exercised due care counter-balances any charge as to the inference arising under the doctrine of res ipsa loquitur. The court in effect allowed the jury to draw an inference of negligence in one portion of its charge, and thereafter in the same series of instructions advised the jury that it was prohibited from drawing such inference. Solemnly to advise the jury that they might infer negligence on behalf of the petitioners, but that they were required to presume no negligence on behalf of the respondent, would be confusing to say the least. In plain language, and from the standpoint of a layman, the court might as well have said: "In this case you may infer that there was negligence but you must presume that there was no negligence."

The court instructed the jury, and properly so, that respondent as a common carrier of passengers for hire owed the duty of exercising the greatest and highest degree of care consistent with the practical management of its business. The vice of the erroneous instruction becomes more clearly apparent in view of the doctrine applicable to common carriers. It was not a question of whether the deceased pilots exercised ordinary care for their own safety. It was a question of whether they exercised the greatest and highest degree of care for the safety of their passengers, and the instruction was, therefore, entirely inconsistent with the measure of care here owed by respondent to its deceased passengers.

The duty of care here involved is that of the greatest and highest known to the law. It is not simply ordinary care. To indulge a presumption in favor of the deceased pilots expressed in terms of ordinary care negates pri-

mary and controlling principles of law upon which the case was submitted.

The action of the trial court as detailed above and the sustaining of his action by the United States Court of Appeals, Tenth Circuit, is in direct conflict with the language of this Court in the landmark decision of *Gleeson v. Virginia Midland Railway Co.*, 140 U. S. 435, 11 S. Ct. 859, wherein this Court in laying down the proper passenger and carrier rule said:

> "The law is that the plaintiff must show negligence in the defendant. This is done prima facie by showing, if the plaintiff be a passenger, that the accident occurred. If that accident was in fact the result of causes beyond the defendant's responsibility, or of the act of God, it is still nonetheless true that the plaintiff has made out his prima facie case. When he proves the occurrence of the accident the defendant must answer that case from all the circumstances of exculpation, whether disclosed by the one party or the other. They are its matter of defense, and it is for the jury to say, in the light of all the testimony, and under the instructions of the court, whether the relation of cause and effect did exist, as claimed by the defense, between the accident and the alleged exonerating circumstances. *But when the court refuses to so frame the instructions as to present the rule with respect to the prima facie case, and so refuses on either of the grounds by which the refusal is sought to be supported herein, it leaves the jury without instructions to which they are entitled to aid them in determining what were the facts and causes of the accident, and how far those facts were or were not within the control of the defendant. This is error.*" (Italics ours.)

Another case in point on this issue is that of *Bowser v. Baltimore & Ohio R. Co.* (3 Cir.), 152 F. (2d) 436. In this case the widow of Harry Bowser brought suit alleging her husband was killed when two engines collided. During the trial which resulted in a directed verdict for the

defendant it appeared that a fireman and brakeman working for the defendant railroad were also killed in the same collision. The trial court held that the railroad was entitled to a presumption that the said fireman and brakeman exercised due care. In reversing the trial court the United States Court of Appeals, Third Circuit, held:

> "In an action against a railroad for the death of an engineer fatally injured in a collision between engines, the presumption that a fireman and brakeman, who were killed in the same collision, exercised due care, was not available to the railroad."

It is fundamental that a presumption of due care is indulged in only to relieve a plaintiff from an inference of contributory negligence and never to supply evidence of the negligence of a defendant. See *Atchison, Topeka & Santa Fe R. Co. v. Toops,* 281 U. S. 351, 50 S. Ct. 281; *Hatzakorzian v. Rucker-Fuller Desk Co.,* 197 Cal. 82, 239 Pac. 709; *Packard v. O'Neil,* 45 Idaho 427, 262 Pac. 881; *Frederickson v. Iowa C. R. Co.,* 156 Iowa 26, 135 N. W. 12; *Dougherty v. Garrick,* 184 Minn. 436, 239 N. W. 153; *Tresise v. Ashdown,* 118 Ohio St. 307, 160 N. E. 894; *Lamp v. Penn. R. Co.,* 304 Pa. 520, 158 Atl. 269; *Devine v. Brunswick-Balke Collender Co.,* 270 Ill. 504, 110 N. E. 780; *State v. Busby,* 102 Utah 416, 131 Pac. (2d) 510.

In *Mikolajczyk v. Allcutt* (3 Cir.), 102 F. (2d) 82, it was held that:

> "A presumption that the deceased exercised due care arises only when necessary to rebut an inference of contributory negligence of the deceased."

In the case of *Waite, et al., v. Pacific Gas & Electric Co.,* 56 Cal. App. (2d) 191, 132 Pac. (2d) 311, the California court said:

> "* * * The law appears to be well settled that instructions embodying the presumption of due care are improper in a case where the rule of res ipsa loquitur applies."

The court went on further to say:

> "The application of the doctrine of res ipsa loquitur raises an inference of negligence against defendant. It would be contradictory for the court also to instruct the jury that there is a presumption the defendant acted with due care."

In *Moeller v. Market Street Ry. Co.*, 27 Cal. App. (2d) 562, 81 Pac. (2d) 475, the California court said:

> "An instruction that the law presumes that the carmen used the requisite care and acted as reasonable persons was properly refused as the doctrine of res ipsa loquitur raised an inference of negligence."

See also *Smith v. Hollander*, 85 Cal. App. 535, 259 Pac. 958, and *Maki v. Murray Hospital*, 91 Mont. 251, 7 Pac. (2d) 228.

II.

The Correction of the Errors Committed Below Will Afford This Court Opportunity to Establish the Sound Principles for Future Guidance in a New and Important Field of Federal Law.

The field of aviation is new and litigation with reference thereto is bound to be extensive. The question of whether or not the doctrine of res ipsa loquitur applies, and if so, in what manner it applies, is one of great public importance.

With the relationship between air companies and the public increasing daily the question of whether or not the doctrine of res ipsa loquitur shall properly be applied to suits arising out of airplane accidents is one of urgent and outstanding importance to the American public. When one considers the many divergent and conflicting decisions handed down on this question by the supreme courts of the several states and by some federal courts, it becomes apparent that it is time for the United States

Supreme Court to lay down a uniform rule to be followed.

For example, it has been held in the following cases that the rule of res ipsa loquitur is applicable to airplane accidents: *Smith v. Pacific Alaska Airways, Inc.,* 89 F. (2d) 253; *Seaman v. Curtiss Flying Service, Inc.,* 247 N. Y. S. 251, 231 App. Div. 867; *Smith v. O'Donnell,* 215 Cal. 714, 5 Pac. (2d) 690, 12 Pac. (2d) 933; *McCusker v. Curtiss-Wright, Inc.,* 264 Ill. App. 502; *English v. Miller* (Tex. Civ. App.), 43 S. W. (2d) 642; *Bramen-Johnson Flying Service, Inc., v. Thomson,* 167 Misc. 167, 3 N. Y. S. (2d) 602; *Genero v. Ewing,* 178 Wash. 78, 28 Pac. (2d) 116; *Fosbroke-Hobbes v. Air Work, Ltd., and British American Air Service, Ltd.,* 1938 U. S. Av. R. 194 (High Ct. of Justice, King's Bench Division, Dec. 21, 1936) (53 T. L. R. 254, 81 Sol. J. 80); *Malone, et al., v. Trans-Canada Airlines,* 1942 U. S. Av. R. 144 (Dominion of Canada, Province of Ontario, Court of Appeals) (3 D. L. R. 369—1942) (Robertson, C. J. C., Middletown & Henderson G. A.).

Contrariwise, it may be noted that various courts have held that the doctrine of res ipsa loquitur is not applicable in airplane accident cases under varying circumstances: *Morrison v. LeTourneau Co.,* 138 F. (2d) 339; *Cohn v. United Airlines, Inc.,* 17 F. Supp. 865; *Herndon v. Gregory,* 190 Ark. 702, 81 S. W. (2d) 849; *Budgett v. Soo Sky Ways, Inc.,* 64 S. D. 243, 266 N. W. 253; *Wilson v. Colonial Air Transport,* 278 Mass. 420, 180 N. E. 212; *Boulineaux v. City of Knoxville, et al.,* 20 Tenn. App. 404, 99 S. W. (2d) 557.

It must further be admitted that travel by plane must now be regarded as a common means of travel, extensively used, not only throughout North America, but all over the entire world. With experienced and careful pilots and proper equipment, the passenger has the same right to expect that he will be carried safely to his destination as if he had chosen some other means of transportation.

CONCLUSION

It is respectfully submitted that the question here involved is not a mere passing element of local interest but one vital to the interest of the public and of commercial airlines. It must be determined to what extent the doctrine of res ipsa loquitur applies. The rights to be decided here are important and basic. For the reasons heretofore advanced and upon the authorities discussed in this brief, it is respectfully submitted that the petitioners are entitled to have their case submitted to this Court for a decision upon correct principles of law.

Respectfully submitted,

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